Polis Wallcovering Inc. *and* Polis Wall Covering Co. and Metro Wall Covering, Inc. *and* Polis Wall Covering Co., Metro Wall Covering, Inc. and Matrix Wall Covering, Inc. *and* Paperhangers Union Local 587, International Brotherhood of Painters & Allied Trades, AFL-CIO. Cases 4–CA–21026, 4–CA–22266, and 4–CA–22881

June 2, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issue in this case[1] is whether the judge correctly resolved unfair labor practice and compliance specification allegations against the Respondents. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and dismisses the complaint against Respondents Metro Wall Covering, Inc. and Matrix Wall Covering, Inc. The Board further orders that Respondents Polis Wallcovering Inc. and Metro Wall Covering, a single employer, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall—consistent with the compliance specification—make whole the following individuals by paying them and, on their behalf, the listed funds, the amounts below, plus any additional amounts that accrue on the fund amounts to the date of payment as computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Interest on their wages shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state law:

	Wages	*Pension Fund*	*Annuity Fund*	*H&W Fund*
Benner, Joseph	$15,335.13	1,387.97	1,311.62	2,903.77
Fumo, Jr., Louis	15,174.48	1,294.36	1,218.22	2,596.34
Hansen, Norm	15,512.50	1,401.77	1,324.52	2,929.46
Iadonisi, Giovan	6,220.76	571.70	540.80	1,208.31
Iadonisi, Salvato	16,176.46	1,416.59	1,335.70	2,896.56
Joniec, Jr., Jos.	2,557.10	235.00	222.30	496.69
Lombard, Walt	5,695.53	517.07	488.72	1,083.97
Pelligrini, Ray	242.15	22.05	21.05	47.04
Pietrowski, Ken	21,512.22	1,834.96	1,727.02	3,680.72
Trainor, Gerald	10,789.88	920.36	866.22	1,846.14
TOTALS	$109,216.21	9,601.83	9,056.17	19,689.00
TOTAL AMOUNT DUE	$147,563.21			

Richard Wainstein, Esq., for the General Counsel.
Marc Kleiman, for the Respondent at Hearing.
Alan F. Markovitz and *Peter M. Stern, Esqs.*, for the Respondent on brief.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on October 16, 1996, pursuant to an order consolidating cases, consolidated complaint and notice of hearing that issued on June 30, 1995. The consolidated cases include a compliance specification that initially related only to Respondent Polis Wallcovering

[1] On January 23, 1997, Administrative Law Judge George Carson II issued the attached decision. The General Counsel filed exceptions and a supporting brief. Respondent Matrix filed an answering brief.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Inc. (Polis).[1] The compliance specification was amended on September 30, 1996, to allege that Respondent Metro Wall Covering, Inc. (Metro) and Respondent Matrix Wall Covering, Inc. (Matrix) are alter egos of, and a single employer with, each other and Polis. The consolidated complaint alleges that Metro and Matrix are alter egos of, or in the alternative, single employers with, each other and Polis and that both failed and refused to apply the collective-bargaining agreement, to which Polis was a party, to the paperhanging work performed by them. Respondents Polis and Metro did not file an answer and did not appear at the hearing. Matrix filed an answer and its president, Marc Kleiman, appeared at the hearing.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent Matrix, I make the following

FINDINGS OF FACT

I. JURISDICTION

Polis, a corporation, was engaged in the business of installing wall coverings from its facility in Philadelphia, Pennsylvania, and during the 12-month period ending May 1, 1994, purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Metro, a corporation, was engaged in the business of installing wall coverings from the same facility as Polis in Philadelphia, Pennsylvania, and during the 12-month period ending May 1, 1994, purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Matrix, a corporation, is engaged in the business of installing wall coverings from its facility in Philadelphia, Pennsylvania, and during the 12-month period ending September 1, 1996, purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Paperhangers Union Local 587, International Brotherhood of Painters & Allied Trades, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

This case had its genesis in 1992 when Polis failed to continue in effect all terms and conditions of its contract with the Charging Party Union by refusing to comply with article 10 which provided that work in the shop would be rotated among the steady employees. The Union filed a charge and a complaint issued on October 29, 1992. No answer was filed, and the General Counsel moved for summary judgment which the Board granted on March 15, 1993. *Polis Wallcovering Inc.*, 310 NLRB No. 112 (not reported in Board volumes). The Board Order was enforced by the Court of Appeals for the Third Circuit in an unpublished order dated September 8, 1993. Thereafter a compliance specification issued on June 30, 1994. Polis filed no answer to the compliance specification.

Polis was established by Joseph Kleiman some 50 years ago. He and his wife Gertrude owned 68 percent of the stock and his sons, Bruce Kleiman (B. Kleiman) and Marc Kleiman (M. Kleiman), each owned 16 percent, a total of 32 percent. Polis, through the Master Paperworkers Guild of Philadelphia, an employer association, was party to successive collective-bargaining agreements with the Union. Joseph Kleiman, in the 1980s, began taking a less active role in the management of the business. By the late 1980s, he played no part in the day-to-day operation of the Company. In 1986, B. Kleiman became president and chief operating officer. B. Kleiman was also in charge of labor relations and his name appears on the two most recent collective-bargaining agreements. No formal bankruptcy documents are in evidence, but it is undisputed that Polis declared bankruptcy. The pleadings place the date as July 12, 1994, but testimony by B. Kleiman places the date as May 7, 1994. Documentary evidence reveals that in 1993 Polis had gross sales of over $1,474,000; however, the cost of these sales exceeded $1,400,000 and, after deducting operating expenses, Polis lost approximately $150,000.

Polis had, prior to May 1994, ceased making appropriate contributions pursuant to the collective-bargaining agreement. The Union, in early May, struck Polis due to this failure to make the contractually required contributions. Polis ceased all operations at that time and never again conducted business.

Polis conducted its business operations out of a warehouse and office owned by Joseph Kleiman that was located at 3943 North Broad Street, Philadelphia, Pennsylvania. The compliance specification names 18 employees, confirming a work force of at least this number in 1992.[4] B. Kleiman was the chief operating officer. B. Kleiman, his brother M. Kleiman, and Jim Attilio estimated jobs and set up the jobs the employees were to perform. Typically, the employees would be advised by telephone where the next job was located. They would report there and B. Kleiman, M. Kleiman, or Attilio would bring them the tools and materials necessary to perform the job. Polis owned one truck and the tools and equipment used by the employees. The wall covering jobs performed were generally commercial, such as office buildings and hospitals, with some residential work. There was no

[1] The compliance specification relates to Case 4–CA–21026 and issued on June 30, 1994. Prior to issuance of the compliance specification the Union had, on November 17, 1993, filed the charge in Case 4–CA–22266 alleging that Metro was operating as an alter ego of Polis. Withdrawal of this charge was conditionally approved on January 28, 1994. The charge was reinstated on December 16, 1994. On June 27, 1994, the Union filed the charge in Case 4–CA–22881 alleging that Matrix was operating as an alter ego of Polis.

[2] The record includes two affidavits of Marc Kleiman that he adopted and that were admitted in lieu of testimony regarding facts that, for the most part, are not in dispute.

[3] Subsequent to the filing of the charges here, Local 587 was succeeded by District Council No. 21, Brotherhood of Painters and Allied Trades, AFL–CIO.

[4] The compliance specification reveals that only 10 of these employees are due backpay.

supervisor actually present on most jobs, which required only one or two men; however, Polis also performed larger jobs involving a crew of 5 to 10 that would be supervised. Polis employed a secretary and owned office equipment. B. Kleiman handled the labor relations for Polis and he had signed the most recent collective-bargaining agreement which was effective as of May 1, 1994, only a few days before the strike and cessation of all Polis operations in early May.

Around 1990, B. Kleiman and M. Kleiman had established a company called Panel Works, Inc., in which each owned a 50-percent interest. The company was intended to be a distributor and installer of fabric wrapped acoustical panels, but, in the words of M. Kleiman, "it didn't take off like we had hoped." Panel Works became dormant until about June 1993 when M. Kleiman changed its name to Metro Wall Covering, Inc., and began soliciting nonunion wall covering jobs. M. Kleiman resigned his position as secretary/treasurer of Polis and became president of Metro. It would appear he was also secretary/treasurer of Metro since B. Kleiman held no formal position with Metro other than 50-percent owner.

Metro operated out of the same building as Polis. The Polis facility was actually two buildings incorporated into one. The building faced North Broad Street, but it also had a back entrance on Dell Street. Metro used 3950 Dell Street as its address. Although M. Kleiman states that he used the back entrance when operating Metro, he acknowledged that he would occasionally go in the front, Polis, entrance. M. Kleiman was the only person who operated Metro on a daily basis, but it is clear that its operations were enhanced by its proximity to Polis and B. Kleiman's 50-percent interest in Metro. Thus, although Metro had a separate telephone line, it was answered by the Polis secretary. Metro paid no electric or water bills and, most significantly, no rent. M. Kleiman testified that Metro had no employees, that all the work he obtained was performed by independent contractors. Metro did not provide any tools or equipment to the persons performing the work. There is no evidence that any Polis paperhanger went directly from Polis to Metro.[5]

When Union Business Representative Joseph Barrett learned of the existence of Metro, he called Marc Kleiman who acknowledged that he was operating Metro as a nonunion firm. M. Kleiman told him that there was not enough work to keep him employed at Polis. Barrett told M. Kleiman that he did not think this was something he should be doing since he was an officer of Polis.[6] In the course of the conversation M. Kleiman acknowledged that he intended to supervise the jobs that he had obtained as estimator for Polis. Barrett told him that he did not think that M. Kleiman should be doing that either.[7] Thereafter the Union sent information requests to Polis and Metro. Metro responded that it had no obligation to the Union, noting that it had no employees and subcontracted its work.[8] Ultimately the Union filed the unfair labor practice charge in Case 4–CA–22266, alleging that Metro was an alter ego of Polis and had failed to honor the collective-bargaining agreement in effect between Polis and the Union.

On January 24, 1994, following discussions in which B. Kleiman had participated, M. Kleiman agreed to cease doing work through Metro, to cease bidding on work through Metro as of January 5, 1994, and to file out-of-existence papers no later than April 30, 1994. Barrett acknowledged that B. Kleiman participated in several of these discussions which also included discussion of "other ongoing problems" regarding the distribution of work in the Polis shop. The Union agreed that Metro could complete all work it had under contract. The agreement notes that the majority of work would be completed by the end of January. The Union agreed to withdraw the unfair labor practice charge, conditioned upon Metro's compliance with the agreement. The Regional Director approved withdrawal of the charge under the same conditions.

By letter dated May 9, 1994, the Union requested that approval of its withdrawal of the unfair labor practice charge be revoked because Metro was continuing to perform work, had not filed out-of-existence papers, and continued to keep the Metro telephone number. The Regional Director, by letter dated December 16, 1994, revoked his approval of the Union's withdrawal of the charge, citing Metro's continued existence and evidence that jobs had been bid after January.

M. Kleiman contends that Metro did not violate the terms of the agreement. Rather, various complications resulted in Metro not being able to complete two of the jobs it had under contract. M. Kleiman credibly explained that one of the jobs was not completed until May due to a problem with custom paint and the other was delayed until July 1994, following a stop-work order issued by the township in which the job was located. He further explained that the Commonwealth of Pennsylvania would not permit the filing of out-of-existence papers until a final tax return was filed and that this was not possible until he had received various accounts receivable. He testified that he filed these papers and that Metro ceased existence as of December 31, 1994. He confirmed that he had kept the telephone number, but I note that cancellation of the number was not part of the agreement and Metro was still in existence on May 4, 1994, when M. Kleiman answered Barrett's call to the Metro telephone number. The record reflects three bids made on Metro letterhead in March, April, and May 1994. As hereinafter discussed, there is no evidence that Metro performed this work; however, submission of the bids did violate Metro's January 1994 agreement to cease bidding work.

Matrix was incorporated on May 25, 1994. M. Kleiman is the sole owner of Matrix and, at the company's inception, was its sole employee. B. Kleiman has no interest in, or dealings with, Matrix. Matrix operates from a different location, 3949 North Broad Street, where it rents an office and some warehouse space from a third party. The fax machine and copier used by Matrix are the property of M. Kleiman. Matrix uses no tools or equipment formerly used by Polis.

[5] The General Counsel, in his brief, argues it should be found that at least two former Polis employees, Manlove and George Robinson, worked for Metro. There is no probative evidence establishing this. Counsel's argument is based on a general statement in M. Kleiman's affidavit that Metro and Matrix used the same individuals. Even if they performed work for Metro, there is no evidence that they went directly from Polis to Metro.

[6] As noted above, M. Kleiman testified that he resigned his position with Polis, but the record does not reflect the date this occurred.

[7] M. Kleiman acknowledges supervising the completion of two jobs.

[8] B. Kleiman responded on behalf of Polis and denied any relationship with Metro, including provision of any services, a denial contradicted by the record evidence.

M. Kleiman uses a car that was under lease by Polis from Fidelity Leasing Group. He has submitted his personal guarantee for the lease. As with Metro, M. Kleiman contends that the work performed by Matrix is performed by independent contractors. Matrix provides the wall covering and paste; the paperhanger brings his table, ladder, buckets, and hand tools. They are not provided by Matrix. There is no evidence that any former Polis paperhanger went directly from Polis to Matrix. Matrix did use Manlove, who drove the truck for Polis, and George Robinson, who had worked for Polis but who had ceased to work for Polis prior to the closure. Additionally, Matrix used an individual who had worked at Polis in the past, but not recently. This person was not paid enough to trigger issuance of a Form 1099.[9]

As noted above, the Metro telephone number was not canceled; it is now the number of Matrix. M. Kleiman explained that, by keeping the telephone number the same, he hoped that Matrix could benefit from contacts he had made through Metro.

B. *Analysis and Concluding Findings*

1. The unanswered pleadings

Counsel for the General Counsel, citing the failure of Respondents Polis and Metro to file an answer to the compliance specification, has moved for summary judgment regarding the computations and amounts due employees as set out in the compliance specification. The Board's Rules and Regulations provide for summary judgment before the Board; there is no specific provision relating to an administrative law judge's authority to grant summary judgment. Although I may have that authority, Section 102.56(c) of the Rules and Regulations provides that the absence of an answer to a compliance specification results in the allegations being deemed admitted. The Board has clearly held that, in such circumstances, an administrative law judge errs in failing to so find. *McKees Rocks Foodland*, 216 NLRB 968 (1975). See also *Galpin Motors*, 200 NLRB 330 (1972). Thus, pursuant to Section 102.56(c), I find the undenied allegations in the compliance specification to be admitted as to Respondents Polis and Metro.[10] Having so found, it is unnecessary to specifically rule on counsel's Motion for Summary Judgment.

Respondents Polis and Metro also failed to filed an answer to the complaint that, inter alia, alleges that Metro is an alter ego of Polis, or, in the alternative, a single employer, and that it violated the Act by failing to apply the terms of the collective-bargaining agreement to paperhanging work performed by Metro. I note that Matrix did file an answer in which it denied alter ego or single employer status as to both Metro and Polis. In *International Shipping Assn.*, 297 NLRB 1059, 1063 (1990), the Board adopted the administrative law judge's decision that it would be unfair to make a finding of joint employer where one of the entities alleged to be a joint employer failed to file an answer in view of denial of such a relationship by the other entity. Thus, I shall not rely on the absence of an answer from Respondents Polis and Metro in regard to their status as alter egos or a single employer insofar as any such finding would have an impact upon Matrix.

2. Respondent Metro

The Board, in evaluating the issue of alter ego, looks to the factors of substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. *Johnstown Corp.*, 313 NLRB 170 (1993). Regarding Metro's status as an alter ego of Polis, I note that both corporations existed simultaneously. Both ceased operations in 1994. The top management of Polis consisted of B. Kleiman and M. Kleiman, until M. Kleiman resigned as secretary/treasurer. M. Kleiman was president of Metro. M. Kleiman was the only person involved in the day-to-day operation of Metro; however, part owner B. Kleiman was involved in the decision to create Metro and permitted Metro's uncompensated use of the Polis facility. He also was involved in conversations with the Union that ultimately resulted in the closure of Metro. Thus, there was some overlap in management. Insofar as Metro was engaged in wall covering, albeit on nonunion jobs, its business purpose was the same. Its operations, however, were significantly different in that Metro hired paperhangers as needed and paid them by the room or job, whereas Polis had regular, "steady" employees. There is no evidence of intermingling of the work forces or oversight of Metro work by anyone other than M. Kleiman.[11] Similarly, regarding the actual performance of jobs, Polis owned and provided its employees with the tools and equipment needed to perform the job whereas Metro neither owned nor provided tools and equipment. The persons it hired as independent contractors had to provide their own equipment. A Metro customer list shows a total of 39 customers, less than half of which had ever been served by Polis.[12] There is no evidence that Metro ever performed any Polis work. Supervision at Polis was carried out by B. Kleiman, M. Kleiman, and Jim Attilio. M. Kleiman was the only "supervisor" at Metro and there is no evidence that B. Kleiman or Attilio ever performed any supervisory functions for Metro. As already noted, B. Kleiman and M. Kleiman each owned 50 percent of Metro.

[9] Pursuant to subpoena, M. Kleiman produced Form 1099s from Matrix for those individuals who had been paid the threshold amount that triggers the preparation of such forms. There were four. Blanda and Beitzel had never been employed by Polis; G. Robinson had worked for Polis but resigned his union membership and ended his employment prior to the bankruptcy and strike; Manlove had been the Polis driver and there is no evidence that he was in the bargaining unit. He is not named in the compliance specification. The Form 1099s reveal that M. Kleiman's affidavit is inaccurate insofar as Matrix did use Manlove; however, there is no evidence that any Polis paperhanger went directly to Matrix or that Matrix ever used any Polis paperhanger who was represented by the Union when performing Matrix work.

[10] Metro ceased existence as of December 31, 1994. The compliance specification was amended on September 30, 1996, adding Metro as a Respondent. Although the full 21 days permitted for answering compliance specifications had not expired when the hearing herein convened on October 16, both owners of Metro were present at the hearing and no appearance was made on behalf of Metro. No answer has been filed on behalf of Metro.

[11] In *Milford Services*, 294 NLRB 684 (1989), employees were commonly supervised and interchanged between the organized and unorganized companies.

[12] The list contains 40 entries, one of which is Polis. Kleiman explained that this was a bookkeeping entry from the failed Panel Works endeavor.

In addition to considering the factors noted above, the Board has, when considering whether a newly formed entity is an alter ego, also considered whether there is evidence of unlawful motivation, that is, hostility towards a union or an attempt to avoid contractual obligations. *Gilroy Sheet Metal*, 280 NLRB 1075 (1986). It is clear that no such showing need be made, rather this is an additional circumstance considered when evaluating the totality of a specific situation. M. Kleiman stated that the purpose of creating Metro was to obtain nonunion work that Polis was unable to obtain. There is no probative evidence that Metro was created to avoid contractual obligations, and I reject General Counsel's argument that the record supports such an inference. The Board has specifically found that the creation of an enterprise for the purpose of obtaining nonunion work does not establish an unlawful motive. *First Class Maintenance*, 289 NLRB 484 (1988); see also *Peter Kiewit Sons Co.*, 231 NLRB 76 (1977); and *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292 (1983). Although serving some of the same customers, there is no evidence that Metro performed any Polis work. This case is, therefore, unlike *Kenmore Contracting Co.*, 289 NLRB 336 (1988), where two thirds of the new entity's customers were former customers of the original corporation and the old entity subcontracted work to the new entity. Id. at fn. 5 and 338. The record herein does not establish that Metro ever performed work that otherwise would have been performed by Polis employees. In addition to obtaining work through advertisements, Metro did bid on jobs for which Polis was unable to submit a bid sufficiently low to be accepted. This is similar to the situation in *First Class Maintenance*, supra, where the unionized entity's bid for maintenance services was rejected because it was too high and the newly created entity submitted a lower, successful, bid.

Although Metro was owned by B. Kleiman and M. Kleiman, I do not find their common ownership dispositive of the alter ego issue in this case. In view of the absence of any involvement in the day-to-day operations of Metro by anyone other than M. Kleiman, the absence of any intermingling of work forces, the significantly different working conditions whereby Metro paid by the room or job and the paperhangers provided their own tools and equipment, the absence of evidence that Metro performed any Polis work, as well as the absence of an unlawful motive, I find that Metro is not an alter ego of Polis.

Notwithstanding the foregoing finding, I agree with the General Counsel that the evidence does establish that Metro is a single employer with Polis. When addressing the issue of single employer the Board looks to the factors of common management, centralized control of labor relations, interrelation of operations and common ownership or financial control. M. Kleiman was the chief operating officer of Metro and, although his brother took no part in the day-to-day operations of Metro, part owner B. Kleiman was involved in the decisions to create Metro, to permit Metro to operate on Polis property, and to allow Metro to obtain information regarding jobs that Polis could not competitively bid on. Although no Polis supervisor took any actions on behalf of Metro, M. Kleiman supervised the completion of two jobs that he had been involved with at Polis. There is no evidence of involvement by B. Kleiman in the labor relations of Metro; M. Kleiman handled all such dealings. There is no evidence that any unit employee of Polis provided any services to Metro. There is, however, an absence of autonomy that establishes an interrelationship of operations at the administrative level. Metro had office space at the Polis facility and paid no rent. The Polis secretary took calls for Metro. Although M. Kleiman testified that the secretary was a friend who performed this service voluntarily, it is clear that she was performing a business service for Metro on Polis property and on Polis time.[13] B. Kleiman and M. Kleiman, each of whom owned 16 percent of Polis, each owned 50 percent of Metro. The acceptance by Metro of space and services from Polis at no charge, together with the 50-percent interest in Metro by B. Kleiman, the chief operating officer of Polis, compels the conclusion that Polis and Metro were a single employer.

It does not follow, however, that Metro was obligated to apply the Polis collective-bargaining agreement to persons with whom it contracted to perform paper hanging work. As the Board pointed out in *Edenwald Construction Co.*, 294 NLRB 297 (1989), "[a] finding of single employer status . . . does not in itself mean that the employees of both entities composing the single employer will be included in a single bargaining unit covered by a . . . contract signed by only one of the nominally separate employers." M. Kleiman has consistently asserted that Metro hired persons as independent contractors to install the wall coverings. There is no evidence that, after finishing a particular job, a paperhanger had any expectation of future work with Metro. M. Kleiman testified that when he had a job he would contact the paperhanger, state that he had a job, and ask if the paper hanger wanted it. He would state the amount he could afford to pay for the job. Sometimes there was haggling and, ultimately, there would be agreement on the price for the job. There is no evidence that any employee of Polis, while employed by Polis, performed work for Metro. The working conditions of Metro paperhangers differed from the working conditions of Polis unit employees. Pursuant to article 9 of the contract that was in effect until April 30, 1994, unit employees were furnished with ladders, pasteboards, trestles, and straightedges. Indeed, the employer could not require an employee to carry tools and, if an employee elected to carry tools, the employee would be paid $4 for any day he carried tools to or from a job. Employees, under the contract, were paid by the hour; Metro paid by the room or job.

I find that the foregoing facts establish, consistent with M. Kleiman's contention and contrary to the General Counsel's argument, that the individuals who performed work for Metro were independent contractors. In this regard, the Board applies the "right to control" test, that is, whether the person for whom the service is provided has the right to control the manner and means by which the result is to be accomplished, or only the result sought. *Pure Seal Dairy Co.*, 135 NLRB

[13] In *Peter Kiewit Sons Co.*, 206 NLRB 562 (1973), revd. 518 F.2d 1040 (6th Cir. 1975), remanded sub nom. *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976), the Supreme Court accepted the finding of the court of appeals that the companies were a single employer. The court of appeals based its finding on various factors including the sharing of office space and a telephone switchboard at company headquarters in Omaha, Nebraska, despite separate Oklahoma facilities, and the transfer of various managerial personnel between the union and nonunion subsidiaries. 518 F.2d at 1042–1044.

76, 79 (1962). Various factors have been found significant in making this determination, including whether payment is for the job or on a piece work basis and whether work can be turned down. See *Carpet Layers Local 419 (Sears, Roebuck & Co.)*, 176 NLRB 876 (1969).[14] I find these factors to be especially significant in a case such as this where, once a job began, these skilled craftsmen were virtually unsupervised. Metro offered work on a job-by-job basis that could be accepted or rejected. Metro provided no tools or equipment, thus the manner in which work was performed, from this standpoint, would be determined by the subcontractor. A skilled paperhanger, who provided himself with superior tools and lightweight equipment, presumably could complete a job in less time with less effort, thereby increasing his per hour earnings. This case is, therefore, similar to *Haas Garage Door Co.*, 308 NLRB 1186 (1992), in which the two individuals who performed virtually all of that respondent's garage door installations were found to be independent contractors. The Board noted that they were paid by the job, the respondent did not withhold taxes, they used their own equipment, they were free to work for other companies, and they sometimes refused work. As already noted, Metro also did not withhold taxes. I find that the persons M. Kleiman hired, like the garage door installers in Haas, were independent contractors.[15]

In view of the foregoing, I find that Metro had no obligation to apply the terms of the Polis collective-bargaining agreement to its independent contractors. Insofar as this is the only violation by Metro alleged in the complaint, it shall be dismissed. In view of my finding that Metro is a single employer with Polis, it is liable for the obligations of Polis under the compliance specification.

3. Respondent Matrix

On January 25, 1994, the accountant for Polis described its financial condition as precarious. Also on January 25, M. Kleiman entered into the agreement with the Union whereby Metro was to cease doing business. Given these circumstances, M. Kleiman began exploring the possibility of opening a new business. He notes that his chief asset was his personal knowledge of the wall covering business gained over 14 years of experience. Matrix was incorporated on May 25, 1994. M. Kleiman is its only owner and, at its inception, was its only employee.

Polis ceased operations in early May, contemporaneously with its inability to make contractual contributions and the union strike against it.[16] M. Kleiman began the process of setting up a new business, Matrix. He obtained office and some warehouse space at a location separate from Polis and Metro. He rented a post office box. He sought to place the lease on the vehicle he had been driving in Matrix's name, but was unsuccessful since Matrix had no credit history. He continued the lease with his personal guarantee. He changed the Metro telephone number to the name of Matrix.[17]

M. Kleiman acknowledges taking various actions on behalf of Metro at the same time he was setting up Matrix. As noted above, he completed the two Metro projects that had been delayed. There is no evidence that the three jobs for which Metro submitted bids in March, April, and May 1994, before Matrix was incorporated, were ever performed.[18] It is undisputed that all remaining Polis work was completed by union contractors. There is no contention that any of it was performed by Metro. M. Kleiman testified that, in concluding the corporate affairs for Metro, he made all necessary Metro telephone calls from his home in the morning, before going to the Matrix office. The General Counsel argues that this testimony is not credible since Metro's customers had to contact Kleiman during the business day; however, the General Counsel produced no evidence establishing this. As of late May 1994, the only Metro job pending was the work that had been delayed due to the township's stop work order.[19] I credit M. Kleiman's testimony that, for his part, he conducted the conclusion of Metro's business from his home.

[14] In *Carpet Layers*, a union was found to have violated Sec. 8(b)(4)(i) and (ii)(B) of the Act by picketing a Sears store, protesting its use of "underpaid" nonunion linoleum layers. The Act was violated because the linoleum layers were found to be independent contractors. They were paid pursuant to a Sears price list and agreed to perform all jobs which "can be satisfactorily completed." within a designated territory, turning down jobs that they felt they could not satisfactorily complete. Id. at 881 and 884. Metro paperhangers had even more discretion that this since they accepted work as it was offered on a job-by-job basis; there was no blanket agreement regarding all work in a designated territory. They were paid an agreed-upon sum by the room or job; there was no Metro price list.

[15] In view of this finding I find it unnecessary to address the issue of whether persons hired by Metro, if deemed to be employees, would properly be part of the Polis bargaining unit. If I were to make such a finding I would find, due to their different working conditions, that these paperhangers did not share a community of interest with the Polis employees and would, therefore, constitute a separate unit. See *Peter Kiewit Sons' Co.*, supra at 78. There is no evidence that the Union sought to represent such a separate unit. See *Edenwald Construction Co.*, supra at 299, in which it is noted that the union never sought to represent the employees of the new company.

[16] There is no evidence that the failure of Polis was fraudulent. As noted in *Kanowsky Furniture*, 314 NLRB 107 (1994), "it is most unlikely that a large employer would [declare bankruptcy] simply to avoid a union . . . it would do that only if it had no other choice." Id. at 111.

[17] In *BC Industries*, 307 NLRB 1275 (1992), the alleged alter ego had retained the telephone number of the closed operation "in order to stay in contact with contractors." Id. at 1279. This factor did not alter the analysis resulting in a finding that the companies did not have substantially identical management, supervision, employees, plant and equipment and business purpose. Additionally, no antiunion motive was proved. Id. at 1281.

[18] The bids of March 30, for an Oki-Data job, and May 6, for a Lanier job, were submitted to Ralph G. Hayden. The customer lists for both Metro and Matrix reveal no work performed for Hayden, Oki-Data, or Lanier. The April bid was to T-3, Inc. The Metro customer list, which contains an account receivable for T-3, establishes only that Metro did work in the past for this customer. M. Kleiman, in a letter dated August 25, 1994, explained the three bids and noted that if the work contemplated became jobs "they are likely to change in scope and will have to be rebid." The Matrix customer list does not reflect any work for these potential customers. Thus, there is no evidence that Matrix performed the work that was the subject of these Metro bids.

[19] There is no evidence that Metro performed any work, other than the completion of this one job, after Matrix was incorporated. I, therefore, reject the General Counsel's argument that Metro "continued to operate to the end of 1994." A more precise statement would be that Metro fulfilled its final contractual obligation by completion of this job and, thereafter, remained in existence until it was able to file its final tax return.

Even if the General Counsel had established that some Metro customer called the Matrix office, this would not affect my decision. Matrix uses none of the office equipment that was owned by Polis and that was used by both Polis and Metro. The assets of Polis were liquidated in the bankruptcy proceeding. There is no evidence in the record suggesting that Metro had any assets.[20]

Matrix, like Metro, performs work through the use of subcontractors. As already noted, M. Kleiman, pursuant to subpoena, produced Form 1099s for four individuals who performed paperhanging work for Matrix in 1994. Two had never worked for Polis, one had ceased to work for Polis prior to the bankruptcy, the other had been a driver, not a journeyman paperhanger. M. Kleiman testified that others also performed work, but were not paid the amount necessary to require the preparation of a Form 1099. One of these persons, A. Reed, had last worked for Polis "many years" prior to the bankruptcy. Insofar as there is no evidence that any journeyman paperhanger came directly to Matrix from Polis, I find a total absence of interchange of personnel.

There is no evidence that Matrix performed any Polis or Metro work. Barrett testified that the work Polis performed was, for the most part, commercial, with some residential work. M. Kleiman confirmed this, but explained that Polis had, due to contacts built up over the years, been permitted to attempt to meet nonunion bids. This became increasingly difficult as the number of nonunion wall covering companies increased. He specifically denies that Matrix attempts to compete in the bidding for "Center City" jobs which, historically, are union jobs. Rather, Matrix seeks jobs that are typically nonunion. As with Metro, there is no evidence that Matrix has performed any work that otherwise would have been performed by Polis. It is undisputed that all unfinished Polis work was completed by union contractors. Pursuant to the agreement with the Union, Metro was to finish all contracted work and it did so. There is no evidence that the three post-January 1994 Metro bids resulted in any work for either Metro or Matrix.

I find insufficient evidence to establish that Matrix is an alter ego of either Polis or Metro. In considering the factors of substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership I find only the factors of business purpose, operation, and supervision to be present as to Metro, and only the factor of business purpose as to Polis. The only manager of Matrix is M. Kleiman. B. Kleiman was the chief operating officer of Polis. Although he was not involved in the day-to-day operations of Metro, B. Kleiman was, as already discussed, involved in the decision to establish Metro and the discussions with the Union that culminated in the closure of Metro. He also was involved in the decisions to permit Metro to operate rent free on Polis property and obtain proprietary information regarding bids. Thus, there had been some overlap in management between Polis and Metro, whereas M. Kleiman is the exclusive manager of Matrix. The business purpose of Matrix, like both Polis and Metro, is the installation of wall coverings. Matrix does operate in the same manner as Metro in that it hires paperhangers as needed and pays them by the room or job. Matrix operates from a different location and, unlike Metro, uses no Polis office equipment. General Counsel's argument that this was a necessity since the equipment of Polis had been sold misses the point. Insofar as Metro's use of Polis equipment was evidence of an interrelationship of operations, the use by Matrix of separate equipment, for whatever reason, is evidence contrary to such a finding. As set out above, there is no probative evidence that Matrix ever performed Polis or Metro work. I find no interrelationship of operations.

In regard to customers, it is undisputed that Matrix has served customers who, in the past, had been served by Polis, as well as by Metro. There is no evidence of any continuing relationship pursuant to which Polis exclusively had performed all work for a particular customer and for whom Matrix now performs all work. Rather, the wall covering jobs are performed on an as needed basis, and this work is obtained by bid on a job-by-job basis. Of work which grossed slightly over $150,000 for Matrix in 1994, some $60,000 was performed for customers who, at some time in the past, had been served by Polis or Metro. Of this figure, approximately $52,800 came from customers who had been served by Polis or Polis and Metro. This leaves only $7200, less than 5 percent of the $150,000 total, performed for exclusively Metro customers. Approximately $90,000 of the Matrix work, over 60 percent, was for customers who had never been served by Polis or Metro. In this regard I note M. Kleiman's testimony that, in establishing Matrix, he relied on his expertise and contacts. As set out above, in 1993 Polis had a gross volume of almost $1.5 million. Its 1993 losses of over $150,000 approximated the gross volume of business performed by Matrix in 1994. The difference in the sheer volume of work confirms that former Polis work is not being obtained or performed by Matrix.[21]

M. Kleiman is the only owner, manager, and supervisor of Matrix. Although he was the only day-to-day supervisor of Metro, he received the benefit of Metro's proximity to Polis. On the closure of Polis, Bruce Kleiman, and Joe Attilio obtained work with companies that had a collective-bargaining relationship with the Union. M. Kleiman began the establishment of Matrix. There is no common ownership. Matrix is not an alter ego of Metro or Polis.

Regarding the issue of single employer, I find the factors of common management, interrelation of operations, and common ownership or financial control between Matrix and Polis, as well as between Matrix and Metro, to be absent. M. Kleiman did handle the day-to-day labor relations for Metro in that it was he who made all arrangements with subcontractors, just as he does for Matrix; however, I find the importance of this factor significantly diminished since the dealings are with independent contractors, not employees. In view of the absence of common management, interrelation of operations, and common ownership, I find that Matrix is not a single employer with either Polis or Metro.

[20] Counsel for the General Counsel did not introduce Metro's final tax return. I am satisfied that if Metro had any assets evidence of those assets would have been presented.

[21] In *P.A. Hayes, Inc.*, 226 NLRB 230 (1976), the Board adopted the finding of the administrative law judge that the new entity, which retained 80 percent of the former company's chief customers, was an alter ego. The judge had considered "in realistic terms" the continuity of the employing enterprise. That continuity is absent in this case.

In reaching the above findings I note that the Board, in cases involving situations similar to the instant case, has found an absence of alter ego or single employer status. In *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292 (1983), the company's responsible management official (RMO) decided to cease performing residential work due to losses sustained by the company as a result of a business recession coupled with the emergence of nonunion firms. A new company, Concord Mechanical, Inc., was established and Victor Valley's RMO, at least initially, participated in making estimates and bids. The RMO's son was president; his son-in-law was superintendent. Concord "inherited" jobs by referral from Victor Valley, and, unlike either Matrix or Metro, actually finished two Victor Valley jobs. Despite this, the Board found that, after its establishment, Concord operated separately from Victor Valley. It noted that Concord was not created to avoid the contract between Victor Valley and the union, but to enable the son of Victor Valley's responsible management official to go into business in a field that Victor Valley was abandoning. No alter ego or single-employer relationship was found. Id. at 1297.

In *Adanac Coal Co.*, 293 NLRB 290 (1989), Adanac ceased operations due to financial difficulties, a bank foreclosure rather than the bankruptcy that forced Polis to close. Adanac's executive, Henry Hall, had owned 60 percent of the company and given 10-percent interests to each of his children. Adanac ceased operations in July 1986, and foreclosure proceedings began in August 1996. In September 1986 Billy Ray Hall, son of Henry and his wife, incorporated C&W Coal Company and was its sole owner. The Board found that legitimate economic and business considerations, including specifically the foreclosure, forced Adnac to cease operation. It held C&W was not an alter ego of Adnac and noted both the absence of common ownership and the absence of financial control over the alleged alter ego by Henry. The decision specifically notes the judge's finding that the son, Billy Ray, "alone runs C&W."

Similarly, the absence of financial or operational control was found decisive in *First Class Maintenance*, 289 NLRB 484 (1988). In that case the parents of William T. Held, Jr. (William Jr.), submitted a bid for a continuing commercial contract that took into account the union labor scale that it would be paying. The bid was rejected. William Jr. bid the job at nonunion rates, was awarded the contract, and thereafter incorporated Clean Sweep. In finding that Clean Sweep was not an alter ego, the Board noted that William Jr. managed Clean Sweep independently. Thus, the family connection did not result in any financial or operational control. The Board also noted the absence of an unlawful motive. First Class was losing a contract due to a decision outside its control. The decision for William Jr. to go into business and bid on the contract his parents had lost through no fault of their own did not constitute unlawful motivation. Id. at 486.

Gilroy Sheet Metal, 280 NLRB 1075 (1986), is a case in which the prior business was dissolved for a combination of reasons, including personal health, financial difficulties, and marital problems. The financial difficulties, as reflected in the judge's decision, were a result of inability to successfully compete with nonunion operations. The prior business, although operated by Hanoum, was technically owned by his wife. On their separation, Hanoum created Gilroy "to survive." Id. at 1077. The Board held that Gilroy was neither an alter ego or single employer and commented on the absence of hostility towards the union, the absence of any interest in the new company by Hanoum's wife, and the evidence that Gilroy did not take over any unfinished work. These factors are also absent in the instant case.

In viewing the evidence in realistic terms, I find no basis for imposing on Matrix the current Polis contract with the Union or the financial liability of Polis for violation of the prior contract. Polis went bankrupt. There is no evidence of any impropriety in the bankruptcy and documentary evidence confirms that Polis was in dire financial straits in early 1994. There is no evidence that Metro contributed in any way to the financial plight of Polis. The Union requested that Metro cease operations. It did so, albeit at a later date than agreed upon, filing out-of-existence papers in December 1994. Neither Metro nor Matrix, nor any other nonunion company, performed any Polis work. There is no evidence that Matrix performed any Metro work. The chief operating officer of Polis and half-owner of Metro, B. Kleiman, had participated in Metro's creation, provided free space, and shared information regarding jobs Polis could not bid. He sought and obtained work with a firm that has a contract with the Union. He has no connection with Matrix. M. Kleiman, utilizing his experience and contacts, set up Matrix as a nonunion firm. Matrix does not seek to compete for "Center City" work which is traditionally union work. Matrix pays rent for a facility other than the building that Joseph Kleiman owned and out of which Polis and Metro had operated. Matrix owns no tools or equipment and hires independent contractors to whom it provides only the paste and wall covering that is to be installed. Matrix is the enterprise of Marc Kleiman, not the Kleiman family and not Bruce and Marc Kleiman. Matrix is neither an alter ego of, nor single employer with, Polis or Metro.

Despite the uncontraverted evidence that both Polis and Metro are no longer operating, I shall, in view of my finding that they are a single employer and consistent with Board precedent, recommend an appropriate compliance order. In view of the absence of an answer to the compliance specification I shall find that the monetary amounts due, as set out there, are correct. The Board has long held that the issue in a backpay proceeding is the amount due, not the ability of a respondent to pay. *Postmasters/Same Day Plus*, 295 NLRB 1169 (1989); see also *Redway Carriers*, 301 NLRB 1113 (1991).

CONCLUSIONS OF LAW

1. Polis Wallcovering Inc., Metro Wall Covering, Inc., and Matrix Wall Covering, Inc. are corporations engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Paperhangers Union Local 587, International Brotherhood of Painters & Allied Trades, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Metro Wall Covering, Inc. is a single employer with Polis Wallcovering Inc.

4. Metro Wall Covering, Inc. is not an alter ego of Polis Wallcovering Inc.

5. Matrix Wall Covering, Inc. is not a single employer with, or alter ego of Polis Wallcovering Inc., or Metro Wall Covering Inc.

6. Neither Matrix Wall Covering, Inc., nor Metro Wall Covering, Inc., has violated Section 8(a)(1) and (5) or the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The complaint is dismissed.

IT IS FURTHER ORDERED that Polis Wallcovering Inc. and Metro Wall Covering, Inc., single employer, and its officers, agents, successors, and assigns, shall, consistent with the compliance specification, satisfy the obligation to make whole the following employees by payment to them, and on their behalf to the listed funds, the following amounts, less appropriate deductions for applicable income taxes and social security, together with interest thereon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

	Wages	*Pension Fund*	*Annuity Fund*	*H&W Fund*
Benner, Joseph	$15,335.13	1,387.97	1,311.62	2,903.77
Fumo, Jr., Louis	15,174.48	1,294.36	1,218.22	2,596.34
Hansen, Norm	15,512.50	1,401.77	1,324.52	2,929.46
Iadonisi, Giovan	6,220.76	571.70	540.80	1,208.31
Iadonisi, Salvato	16,176.46	1,416.59	1,335.70	2,896.56
Joniec, Jr., Jos.	2,557.10	235.00	222.30	496.69
Lombard, Walt	5,695.53	517.07	488.72	1,083.97
Pelligrini, Ray	242.15	22.05	21.05	47.04
Pietrowski, Ken	21,512.22	1,834.96	1,727.02	3,680.72
Trainor, Gerald	10,789.88	920.36	866.22	1,846.14
TOTALS[23]	$109,216.*21*	9,602.36	9,056.*17*	19,689.*00*

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] The italicized figures have been corrected to reflect the correct total from the column above them.